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March 17, 1995

John Cimko
Federal Communications Commission
1919 M Street, NW
Washington, D.C.

Handwritten signature: Rm.
Stamp: MAR 21 1995

RE: EX PARTE COMMENTS

In conformance with 47 C.F.R.1.1206(1) two copies of this letter have been filed the proceedings captioned:

In the Matter of Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Services Providers, Docket No. RM-8577

Dear John:

The Cellular Telecommunications Industry Association filed a petition on December 22, 1994 asking the FCC to initiate a rulemaking to preempt all state and local authority governing the siting of cellular and other communications facilities. The National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following ex parte comments opposing the December 22, 1994 Cellular Telecommunications Industry Association Petition for Rulemaking."

There are three reasons not to grant the CTIA petition.

First, such generic preemption is clearly precluded by the legislative history underlying the recently amended Section 332 of the Communications Act.

Second, such preemption could potentially overwhelm the already hardworking but overburdened FCC staff.

Finally, even we assume, arguendo, that preemption is permissible and the FCC staff could handle the additional workload, the CTIA petition has failed to present any evidence that any relief is warranted.

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*Member of the Executive Committee of the Association

As I'm sure you are already much more intimate with the resource allocation problems facing the FCC's hard working staff, I will only address NARUC's other two contentions.

I. GENERIC PREEMPTION IS PRECLUDED BY CONGRESSIONAL INTENT.

The CTIA petition characterizes the State role under 47 C.F.R. Section 332 as very limited. An examination of the clear text of the statute suggests otherwise. Only entry regulation is entirely preempted. Under the correct circumstances, it is a State that may, under the explicit language of the statute and regulate the rates of these carriers. Moreover, other than rates and entry, according to the statute, basically everything other type of State regulatory requirement is still valid.

Specifically § 332 says:

Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, **except this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.** 47 U.S.C. § 332, Omnibus Budget Reconciliation Act of 1993 Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

For example, its clear under the terms of the Statute, that, to be able to exercise the clearly defined right to reassert jurisdiction over rates, a State can require much of a prospective or existing carrier, e.g., information tariffs, information on rates of return, customer trends and complaint data, etc.

However, more to the point, the specific preemption desired here is specifically excluded by a pointed reference in the legislative history of the statute.

The Conference report merely adopts the House language without change noting that the House bill provides that "nothing shall preclude a state from regulating the other terms and conditions of commercial mobile services" and that "Section 332(c)(3)(A) of the Senate Amendment is identical to the House provision" in this respect. However, the House report, as the CTIA petition notes, specifically references "facilities siting issues" as terms and conditions within the state's purview. CTIA petition at 7, note 16. Specifically, the House Report states:

"It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By "terms and conditions", the Committee intends to include such matters as ...facilities siting issues (e.g. zoning).." See, H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993)

In an attempt to provide some legal rationale for its requested rulemaking, CTIA tries to equate zoning regulations with the entry regulation. Even in the absence of the clear legislative intent quoted above, particularly with the utter absence of any evidentiary showing, such a broad brush approach must fail. Otherwise, there is nothing left of state jurisdiction over radio services. As the courts have noted in other contexts, "any state regulation of radio common carriage might in some respect burden entry." Cf. *California v. FCC*, 798 F.2d 1515, 1519 (D.C. Cir. 1986). Accordingly, if a Court accepted the proffered rationale, again in a case completely bereft of any evidentiary support, no state-imposed term and condition could be sustained.

In light of the specific reservations of the statutory text, the legislative history, the inherently localized, and often hotly contested, nature of zoning disputes, and the parens patriae interest States⁶ have historically held over such matters, NARUC respectfully suggests that a blanket preemption of State zoning regulations is simply not sustainable under the earlier discussed amendments to Section 332.

II. CTIA HAS NOT PRESENTED ANY EVIDENCE THAT RELIEF IS WARRANTED.

The CITA petition is completely bereft of any showing of facts or circumstances to support the action requested. The petition fails to cite to a single local siting ordinance which has "physically delay[ed]" or prevent[ed]" the siting or buildout of towers. CTIA Petition at 13. Nor did CTIA manage to proffer a single instance in which a wireless carrier has been aggrieved by local siting regulations. Even in the case of its contentions concerning the supposed "excessive costs" associated with local siting regulations, credited by CTIA with hampering the deployment of wireless facilities, the association fails to provide even anecdotal data that suggest any undue delay or document "excessive costs".

⁶ Though of course subject to federal constitutional strictures, zoning matters are inherently local. Indeed, the State's authority over such matters springs directly from its core sovereign authority to protect the public health and welfare. In the words of the United States Supreme Court, "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Robert Warth, et al. v. Ira Seldin, et al.*, 422 US 490, 508, n.18; 45 L Ed 2d 343, 360 n.18 (1975). " Cf. *Schad v. Mt. Ephraim*, 452 U.S. 61, 68, 68 L Ed 2d 671, 680 (1981), where the Court notes "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities."

In contrast, in other forums, the CTIA's president has said, in reference to general industry growth, including, *inter alia*, cell site additions undertaken in the face of all the alleged burdensome state and local regulation, "I'm running out of superlatives to describe the wireless industry's amazing performance..." See, Communications Daily, Tuesday March 14, 1995 at page 3. Specifically, that article notes that, in stark contrast to the allegations raised in their petition, the cellular industry...

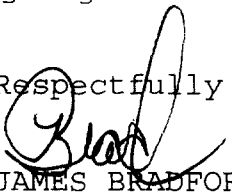
"added 3,189 (21.6%) cell sites in the 2nd half of the year, to a record 17,920. **New sites exceeded total through the first 4.5 years of record keeping.** For full year, sites expanded 39.9%, exceeding year-to-year growth for any previous period." Id.

NARUC suggests these statements, provided by CTIA itself, are hardly statements that suggest serious unresolved cellular citing issues are outstanding.

Moreover, these statements also provide an excellent explanation why the CTIA petition fails to present any factual information to support its contentions concerning the alleged impact of zoning regulation on entry into the market. It doesn't appear that there is any significant impact. Indeed, the CTIA report shows records broken in "all categories" and "marked continued rapid growth in all industry measurements" including new cell sites. Id.

Accordingly, for the foregoing reasons, we request that the FCC reject the CTIA petition.

Respectfully Submitted,


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